CONTENTS

13359—26——1

CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 284

THE UNITED STATES OF AMERICA AND INTERSTATE Commerce Commission, appellants

v.

THE NEW YORK CENTRAL RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION

The opinion of the District Court (Circuit Judge Hough and District Judge Knox concurring, District Judge Cooper dissenting) on August 31, 1925, is reported as *New York Central Railroad* v. *United States,* 13 Fed. Rep. (2d) 200.

The report of the Commission is reported as *State of New York* v. *New York Central Railroad,* 95 I. C. C. 119.

JURISDICTION

The suit was commenced and the appeal was taken under Commerce Court Act (ch. 309, 36 Stat.

539), and Urgent Deficiencies Act (ch. 32, 38 Stat. 219, 220). The latter provides:

> A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree. * * *

QUESTION

The question is whether under paragraph (13) of section 6 of the Interstate Commerce Act, which was amended by the Panama Canal Act of August 24, 1912 (ch. 390, 37 Stat. 566, 568), and sections 412 and 413, Transportation Act of 1920 (ch. 91, 41 Stat. 483), the order of the Commission (R. 7) is valid which directed the New York Central to provide and maintain a transportation service between the Erie Basin Barge Canal Public Terminal, in Buffalo, and points and shippers located on the line of the railroad and on the lines of its connections, and perform upon the standard-gauge railroad tracks within the Terminal and connected with the railroad's tracks the operating service necessary to an interchange of traffic with barge-canal lines at the Terminal—the service to embrace both interstate and intrastate traffic that may be transported to or from the Terminal over the railroad; that the service shall include the furnishing by the railroad of all cars necessary for the transportation of the traffic between the Terminal and

the points and shippers, and the operation by the railroad with its own motive power and servants upon railroad tracks within the Terminal, of all railroad cars, loaded and empty, going to or coming from the Terminal, including the spotting, placing, and removal of the cars therein and therefrom.

STATEMENT

The State of New York has constructed and equipped the Barge Canal at a cost claimed to approximate nearly $175,000,000 (R. 20, 29), which it now maintains for the public use. The Canal has a channel with a depth of 12 feet and a minimum cross-section area of 1,125 square feet and extends from its Terminal in Buffalo down the Niagara River to Tonawanda, thence eastwardly to Waterford, where it connects with the Hudson River. Branches extend north from Waterford to Lake Champlain, north from the vicinity of Syracuse to Lake Ontario and south to Cayuga and Seneca Lakes. (R. 24.) Terminal docks, piers, warehouses, and railroad tracks have been constructed at various points along the Canal and equipment for transferring or handling freight has been installed. (R. 24.) The State furnishes the Canal and its facilities to common carriers by water without charge. (R. 24.) The capacity of the Canal is from 15,000,000 to 20,000,000 tons from May 1 to December 1. (R. 24.) The locks will take barges of 4,000 tons displacement and for the past two seasons 600 barges with an average displace-

ment of 2,500 tons have operated between Buffalo and New York.[1]

Erie Basin Terminal is situated upon the harbor adjacent to Lake Erie and within the city of Buffalo. The basin has a depth of 20 feet and the Terminal has an area of 9.25 acres. The expenditure for the site, construction, and equipment of the Terminal amounts to $2,300,000, which includes $60,000 for railroad tracks. (R. 25.) There are two covered piers or docks. Pier No. 1 is 500 feet long and 150 feet wide and has a steel and brick warehouse with a floor area of 35,000 square feet. Pier No. 2 is 400 feet long, 150 feet wide, and has

---

[1] *Inland Marine Corporation.*—Operates 11 cargo-carrying steamers of 185 tons capacity, and 75 cargo barges of 300 to 600 tons capacity. Service embraces bulk-cargo movement between Buffalo and points within lighterage limits of New York harbor, and a carload and less-carload service from New York to Buffalo, with interchange at Buffalo with the lake lines from Chicago, Cleveland, Detroit, Duluth, Milwaukee, Minneapolis, St. Paul, and points in Minnesota, North and South Dakota, Montana, Western Canada, and the Northwest Pacific States, on joint canal-and- lake and canal-lake-and-rail rates.

Interwaterways Line, Inc.—Operates 5 steel motor ships, of 1,500 tons capacity each, in a bulk-cargo service between New York and Buffalo.

Murray Transportation Company.—Operates 12 300-ton and 29 500-ton barges, 12 600-ton deck-loading barges, and 3 tugs, for bulk cargoes between points in New York harbor and ports on or reached via the New York State canals.

New York Canal & Great Lakes Corporation.—Renders service on bulk cargoes between New York and canal ports, and a non-break-bulk service to Lake Erie ports. Oper-

a frame warehouse with a floor area of 6,400 square feet.

The machinery for loading and unloading includes two electrically operated semiportal jib cranes with a capacity of 3 tons each, package conveyors, traction cranes, and miscellaneous hand-operated and power-operated devices. The Terminal has over 5,000 feet of standard-gauge railroad tracks with turnouts and a storage yard with capacity of 30 cars. These tracks extend from both sides of Pier No. 1 and from the north side of Pier No. 2 to the westerly bounds of New York Central's

---

ates 51 750-ton steel cargo barges, 3 750-ton wooden barges, and 15 450-ton cargo-carrying powerboats.

Rochester Terminal & Canal Corporation.—Operates 10 450-ton wooden barges, with three power units. Shipments contracted for movement to and from all New York State canal and Long Island Sound ports. Merchandise shipments between New York and Rochester handled upon prior arrrangement.

Transmarine Corporation, Canal Division.—Operates 30 400-ton steel barges, with 5 towing tugs. Service rendered comprises bulk-cargo movement between Buffalo and New York harbor points, and merchandise service westbound from New York harbor points to Buffalo and west thereof, reached by lake connections on joint canal-and-lake and canal-lake-and-rail rates. Principal ports are Buffalo, Cleveland, Detroit, Chicago, Milwaukee, Duluth, Superior, Minneapolis, and St. Paul.

In addition, about 20 carriers are operating in intermittent service between canal ports. The interveners are among the canal carriers which do not file tariffs with us or with the State commission. Information as to rates and other transportation matters is available to shippers through the office of the Superintendent of Public Works. (R. 24, 25.)

13359—26——2

right of way parallelling the water front, the curvature near the point of connection ranging from 10° to 21°. (R. 25.)

New York Central has installed a switch with turnout from its westerly track forming a connection with the Terminal tracks. This westerly track is a siding having a dead end about 400 feet north of the switch point of turnout. Because of the construction and weight of the U-type switch engine New York Central has discontinued the construction of industrial sidings with a greater curvature than 12° to 15°. (R. 25.)

The curvature in reaching the Terminal tracks (R. 25) compares favorably with that of other tracks leading to waterfront properties in the vicinity, operations over which do not appear to have been abandoned by New York Central.

The latter's tracks adjacent to the Terminal are used by three other trunk line companies and each day about 100 passenger trains pass over them. These tracks are also used in switching service between New York Central's facilities and interchange points with its connecting lines. New York Central has on occasion spotted cars on the switch connection and removed cars therefrom and expresses its willingness to do so in the future. New York Central refuses to operate over the State's tracks.[2]

---

[2] Witness McKeown, harbor master of Barge canal at Troy, testified:

"The New York Central switched cars into our terminal. The Boston & Maine also shipped or spotted cars on our

During 1922 Barge Canal carriers interchanged about 1,106,000 tons of freight at Buffalo with Lake carriers. One-half consisted of ex-lake grain. (R. 26.) The Barge Canal carriers also brought about 38,000 tons of local traffic into Buffalo and took outbound about the same. Approximately 75 per cent of the traffic on the Barge Canal is interstate. Traffic officials of five of the principal industries at Buffalo testified in favor of the order. If the proposed service were established, the traffic manager of the Buffalo Chamber of Commerce estimated the volume of traffic that would move over the connection would range from 100,000 to 125,000 tons annually. The representative of one of the principal shippers estimated that its traffic alone would amount to 20,000 tons annually. (R. 26.)

The effect of the refusal of the New York Central to perform the transportation service is to preclude any interchange of traffic at the Terminal between the rail and Barge Canal carriers. (R. 26.)

New York Central's main line between Buffalo and New York practically parallels the Barge Canal and serves all important points reached by it. The order of the Commission was strenuously opposed

---

terminal. The number of tons actually spotted at the terminal amounted to between 10 and 11 hundred tons." (R. 87.)

Witness Wadsworth, Troy, who testified for New York Central, also said:

"During the last season of navigation the New York Central did take cars to or from the State terminal at Troy." (R. 118, 119.)

because (*a*) its effect would be to divert to the Barge Canal much traffic which now moves over the New York Central, including traffic to and from industries located on its rails, and to compel it to accept, in lieu of remunerative line hauls, switching movements at relatively small charges (R. 26); (*b*) numbers of industries in Buffalo are not located on rail lines and must dray or truck their traffic in any event, and industries on New York Central, if desiring to utilize the Canal, should also dray or truck their traffic thereto or therefrom or avail themselves of their water connections where existent; (*c*) while a curvature of 21° apparently would be encountered on but one of the tracks entering the Erie Basin Terminal, the requested service would seriously interfere with the already congested main-line operations (R. 26).

The State of New York and Edward S. Walsh, Superintendent of Public Works, alleged in the complaint "a physical connection between the standard-guage tracks laid by the State within the Terminal premises, running down to and around the piers, has been made with the railroad tracks of the defendant wholly outside the Terminal" (R. 17); the New York Central reaches industries in and around Buffalo and actually interchanges traffic with all railroads serving that region and the only method of interchanging traffic between the Terminal and the Barge Canal with the railroads and industries is over the tracks of

the New York Central by means of the physical connection between its tracks and the tracks within the Terminal (R. 18); the tracks within the Terminal and the physical connection are suitable, safe, and proper for the purpose; notwithstanding repeated demands, New York Central had refused to interchange any traffic whatever (R. 18); the traffic is largely interstate with considerable important intrastate traffic not moving. (R. 18).

New York Central in its answer admitted there is a physical connection between its tracks and the tracks within the Terminal, which is the only method of railroad interchange now available between the Terminal and industries, terminal tracks, and stations located on New York Central lines at Buffalo. New York Central by way of separate defenses set up that the State of New York is not a common carrier by rail or water, had no status under the Interstate Commerce Act to maintain the proceeding, the Commission had no jurisdiction to entertain the complaint, that no carrier by water was a party to the proceeding, and the jurisdiction conferred upon the Commission by subdivision 13 of section 6 is conditioned upon the presence of each and every of the carriers by water required to participate in the payment of the expense of operating water and rail terminals. (R. 76.)

Rochester Terminal & Canal Corporation and Interwaterways Line, Inc., intervened (R. 78) in

the complaint and alleged they were common carriers operating canal boats, tugs, and other equipment for the transportation of goods, wares, and merchandise on the Barge Canal into and out of the Erie Base Terminal, and that they should be able to interchange traffic with New York Central is essential to their business since they have no other means of reaching carriers by rail in the Buffalo switching district at Erie Basin Terminal except from the lines of New York Central.

On the hearing before the Commission both sides offered oral testimony and exhibits, including the record of the evidence and proceedings before the Public Service Commission of the State of New York—Second District—Case No. 7060, In the Matter of the Complaint of Edward S. Walsh as Superintendent of Public Works of the State of New York against United States Railroad Administration—New York Central Railroad—as to operation of railroad tracks at Erie Basin Terminal, Buffalo. (R. 79.) The Public Service Commission had ordered the New York Central to furnish the transportation service. The Appellate Division of the Supreme Court of the State of New York held that while the Terminal was entitled to the service as a matter of right, the Interstate Commerce Commission and not the Public Service Commission had the authority to act and accordingly vacated the order. (198 A. D. Rep. 436.) The judgment of the Appellate Division was affirmed by the Court of Appeals without opinion, 232 N. Y. 606, and this

Court denied petition for writ of certiorari, 258 U. S. 621. (R. 23.)

The petition avers that the order of the Commission is void on approximately sixteen grounds, paragraphs 10 to 25, inclusive. They may all be grouped under the general proposition that the order was not authorized by paragraph (13) of section 6 of the Interstate Commerce Act as amended, *supra*. The District Court took that view (R. 127) and permanently annulled and enjoined the order. From the final decree (R. 138) this appeal was taken (Tr. 142).

ARGUMENT

SUMMARY

I. The State of New York owns and maintains the Terminal. The State never claimed that the State "is beyond and superior to the regulatory or coercive power of the Commission" whose jurisdiction it invoked in the utmost good faith without reservation of any kind either then or thereafter. (*Georgia* v. *Chattanooga*, 264 U. S. 472; *United States Bank* v. *Planters' Bank*, 9 Wheat. 904, 907; *People, ex rel, New York Central* v. *Public Service Commission*, 198 App. Div. 436, 441; 232 N. Y. 606; 258 U. S. 621.) United States and States have frequently appeared as complainants and asserted claims before the Interstate Commerce Commission and the courts and their right to do so has never been questioned. (*State of New York* v. *United States*, 257 U. S. 591; *Same* v. *Same*,

272 Fed. Rep. 760; *United States* v. *State of Tennessee,* 262 U. S. 318; *State of Tennessee* v. *United States,* 284 Fed. Rep. 371; *City of New York* v. *United States,* 272 Fed. Rep. 768; *State of North Dakota* v. *Chicago & Northwestern,* 257 U. S. 485.)

II. In order to invoke the jurisdiction of the Commission it was not necessary that the State of New York should be a common carrier. Its ownership and maintenance of the Terminal qualified it as a proper party under the statute to file the complaint.

III. Erie Basin Terminal is a facility of interstate transportation. (*People, ex rel, New York Central* v. *Public Service Commission,* 198 App. Div. 436; *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296, 305; *Michie on Carriers,* Vol. 1, page 3, Sec. 1.)

IV. The opinion of the District Court not only erroneously made over and constricted the findings of the Commission but its added failure to recognize the State of New York as a party with any right or standing before either the Commission or the Court was likewise erroneous.

V. The order of the Commission is not invalid because it embraces "all traffic, interstate and intrastate," that may be transported to or from the Terminal over the New York Central Lines. (*Minnesota Rate Cases,* 230 U. S. 352; *The Shreveport Case,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,*

257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *United States* v. *Village of Hubbard*, 266 U. S. 474; *United States* v. *State of Tennessee*, 262 U. S. 318; *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456.)

I

THE STATE OF NEW YORK OWNS AND MAINTAINS THE TERMINAL. THE STATE NEVER CLAIMED THAT THE STATE "IS BEYOND AND SUPERIOR TO THE REGULATORY OR COERCIVE POWER OF THE COMMISSION" WHOSE JURISDICTION IT INVOKED IN THE UTMOST GOOD FAITH WITHOUT RESERVATION OF ANY KIND, EITHER THEN OR THEREAFTER

Because of its ownership by the State of New York the District Court declined to recognize the Terminal as a transportation facility subject to any regulation whatever, and appears to have held that the State of New York, in its ownership and maintenance of the Terminal, could not under any circumstances bring the operations thereof within the terms and provisions of the statute unless and until it "should enter upon common carriage, *and for that purpose acquire rolling stock*," *etc.* Under the "rolling stock" test announced by the District Court, if the New York Central Railroad owned it the Terminal presumably would be subject to such regulation. In short, the *ownership* of this Terminal and not the service that is or may be rendered thereby and thereover appears to have been made the basis of its noninclusion in the statute by the District Court.

In *Georgia* v. *Chattanooga,* 264 U. S. 472 (cited by counsel for the Government in the District Court), this Court rejected the argument that the State-owned railroad was not subject to the local ordinance of Chattanooga. On the authority of that case, the District Court in the instant case in substance held that if the State of New York should enter upon common carriage and for that purpose acquire rolling stock, etc., it "might well *pro tanto* lay aside its sovereignty and subject itself to the jurisdiction of mere regulatory authority, whether of its own creation, of another State, or of the Nation" (R. 130); that while it maintains its sovereignty and does not descend to the status of a common carrier with *rolling stock,* etc., it may not invoke the jurisdiction of the Commission.

The United States without placing itself "beyond and superior to the regulatory or coercive power of the Commission" has repeatedly invoked the jurisdiction of the Commission on complaints concerning Government traffic and its right to do so has never been questioned. (*United States* v. *Baltimore & Ohio,* 80 I. C. C. 143; *United States* v. *Sumpter Valley Railway Co.,* 53 I. C. C. 607; *Boise Lumber Co.* v. *Pacific & Idaho Northern,* 33 I. C. C. 109; *United States* v. *Union Pacific Railroad,* 28 I. C. C. 518, 520; *United States* v. *Alabama & Vicksburg Railway,* 40 I. C. C. 405; *United States* v. *Denver & Rio Grande,* 18 I. C. C. 7; *United States* v. *Adams Express Co.,* 16 I. C. C. 394; *United States* v. *B. & O. R. R. Co.,* 15 I. C. C.

470; *United States* v. *N. Y. P. & N. R. R. Co.*, 15 I. C. C. 233.)

The States without placing themselves "beyond and superior to the regulatory or coercive power of the Commission" likewise have repeatedly invoked the jurisdiction of the Commission and their right to do so has never been questioned. See *Ex parte 74*, 58 I. C. C. 220, and subsequent proceedings before the Commission in which States assailed the increased intrastate rates. (New York, 59 I. C. C. 290; 64 I. C. C. 55; Wisconsin, 59 I. C. C. 391; North Dakota, 61 I. C. C. 504; Illinois, 59 I. C. C. 350; 60 I. C. C. 92; Minnesota, 59 I. C. C. 502; Texas, 60 I. C C. 421, 62 I. C. C. 591; North Carolina, 60 I. C. C. 362; Nevada, 60 I. C. C. 623; Michigan, 60 I. C. C. 245.)

States as proper parties and without placing themselves "beyond and superior to the regulatory or coercive power of the Commission" have likewise maintained suits in the courts. (*State of New York* v. *United States*, 257 U. S. 591; *Same* v. *Same*, 272 Fed. Rep. 760; *United States* v. *State of Tennessee*, 262 U. S. 318; *State of Tennessee* v. *United States*, 284 Fed. Rep. 371; *City of New York* v. *United States*, 272 Fed. Rep. 768; *State of North Dakota* v. *Chicago & Northwestern*, 257 U. S. 485.)

Erie Basin Terminal as owned and maintained by the State of New York is a facility of transportation; nothing else. And if interstate traffic *does or may* move over or through the Terminal

it becomes, regardless by whom or how it is operated, as completely subject to the power of Congress to regulate commerce and regulation by the Commission as the New York Central Lines.

In *Georgia* v. *Chattanooga, supra,* Georgia undertook to construct a railroad between Atlanta and Chattanooga and for its yards purchased about eleven acres in the outskirts of the latter city. The legislature of Tennessee granted to Georgia the right to secure the necessary right of way from the State line to Chattanooga. Georgia at one time had operated the railroad but since 1870 it has been operated by lessees. Chattanooga undertook to condemn for street purposes a strip through the railroad yard. Georgia challenged her right to do so on the ground that the land thus acquired by a sister State was not subject to condemnation. In dismissing the original bill for want of equity, this Court said (264 U. S. 480, 481):

> Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad; and, as to that property, it cannot claim sovereign

privilege or immunity. (*Bank of United States* v. *Planters' Bank*, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 323; *Louisville, C. & C. R. R. Co.* v. *Letson*, 2 How. 497, 550; *South Carolina* v. *United States*, 199 U. S. 437, 463.) Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.

In *United States Bank* v. *Planters Bank*, cited *supra*, this Court said:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. (9 Wheat. 907.)

From *United States Bank* v. *Planters Bank* (1824) to *Georgia* v. *Chattanooga* (1924) the principle has spanned more than one hundred years.

When, therefore, the State of New York invoked the jurisdiction of the Interstate Commerce Commission, she did not set her sovereignty over and above the power of Congress to regulate interstate commerce; nor was it "an accurate way of putting the question" to inquire "whether at the request of a sovereign State which is not a common carrier but

is beyond and superior to the regulatory or coersive power of the Commission—that body can lawfully compel a carrier undoubtedly subject to its jurisdiction to operate the State's property," etc.

When she invoked the jurisdiction of the Interstate Commerce Commission the State could not at the same time consistently set up her sovereignty in defiance of the power of Congress to regulate commerce, just as when Georgia went into Tennessee she could not defy Tennessee's laws. Nor has the State of New York ever attempted to do so. There has never been the shadow of a doubt what her claim was in any tribunal before which she appeared to assert it and there is certainly none here. The record does not contain the slightest evidence or suggestion that the State of New York invoked the jurisdiction of the Interstate Commerce Commission or conducted the hearing before that body with a mask on only to have it torn off by the District Court.

The authority and right of the State as any other party peacefully to submit her controversies to the jurisdiction of the duly-constituted tribunals of government, judicial or other, should be encouraged and sustained on all sides and at all times and by the courts above all others. The use of such expressions as "It is always advisable, and sometimes vital, to get behind the forms and formal parties of a litigation and ascertain who is the actual person insisting on the demand in suit, what

that person wants, and why it is wanted" (R. 130), and "In form this suit has nothing to do with the State of New York, but the truth is that the State is by long odds the person or party most seriously involved and it is the maker of the essential demand herein" (R. 130), in order to turn her away as a party without standing and not entitled to be heard or to cast doubt on the good faith of the State and those who represent her should be rejected.

Contrariwise was the action of this Court in *North Dakota* v. *Chicago & Northwestern Railroad,* 257 U. S. 485, 490. In dismissing the original bill filed by the State of North Dakota to set aside an order of the Interstate Commerce Commission, and sending the State to the District Court as a party in interest to bring her suit under the Constitution and laws of the United States as any other litigant, this Court said:

> The main contention of the State is that if in the opinion of the Court it has a substantial right that is infringed by what the defendants are doing, Congress neither can take that right away nor prevent the State from proceeding in this Court for such remedy as law or equity may afford. But if these premises were granted, it would not follow that the bill should be maintained. It is a proceeding in equity in which the requirements of complete justice and of public policy must be taken into account. When they are considered it seems to us pretty clear that the State should be remitted to

> the remedy offered by the statutes—a suit in the District Court in which the United States is made a party. Complete justice requires that the railroads should not be subjected to the risk of two irreconcilable commands—that of the Interstate Commerce Commission enforced by a decree on the one side and that of this Court on the other.

When the State of New York filed the petition before the Interstate Commerce Commission her own courts had held in this very case that Congress had taken possession of the entire field of regulation into which the State may not enter.

In *People, ex rel New York Central,* v. *Public Service Commission,* 198 App. Div. 436, 441 (affirmed Ct. App. N. Y., without opinion, 232 N. Y. 606; certiorari denied by this Court, 258 U. S. 621), the Appellate Division, speaking through Mr. Justice Van Kirk, said:

> This act of Congress not only gives to the Interstate Commerce Commission power to establish physical connection between the lines of the rail carrier and the dock, but also to direct the rail carrier and the water carrier singly or jointly "to construct and connect with the lines of the rail carrier a track or tracks to the dock"; also full authority to determine and prescribe the terms and conditions upon which these tracks shall be operated and by whom, and what sum shall be paid to or by either carrier; also to fix rates. This act of Congress was intended to and

does cover the same field covered by the aforesaid State statute; and under it the question whether the railroad company could be compelled to operate beyond the connection itself, decided in *People ex rel. Erie R. R. Co.* v. *Pub. Serv. Comm.* (176 App. 28; 220 N. Y. 674), can not fairly arise. The freights the relator is required to carry over this connection and over the tracks in the basin are interstate commerce. (*Louisville, etc. R. R. Co.* v. *Stock Yards Co., supra,* 142, 143.) It is true that the only shippers named in the order are those within the State of New York. By naming these shippers no limitation of the use of the terminal to intrastate commerce was accomplished. (*McFadden* v. *Alabama Great Southern R. Co.,* 241 Fed. Rep. 562.) The relator company will be required to receive freight brought to the terminal by the water carrier, wherever its origin, and it will be required to transport from the shipper to the dock freight wherever its destination; and in general to interchange such traffic as is presented for interchange at the terminal. The record shows that freights upon the canal include shipments from foreign countries, as well as from other States of the Union. "Commerce takes its character as interstate or foreign when it is actually started in the course of transportation to another State or to a foreign country." (*Louisiana Railroad Commission* v. *Texas & Pacific Railway,* 229 U. S. 336.) "A train moving and carrying freight between two points in the same State, but which is hauling freight between points one of which is within and the other without

the State, or hauling it through the State between points both without the State, is engaged in interstate commerce and subject to the laws of Congress enacted in regard thereto." (*Northern Pacific Railway* v. *Washington*, 222 U. S. 370, head note.) Congress having exerted its authority to regulate interstate commerce by the direction and control of connections between rail carriers and water carriers, the entire subject of such connections is removed from the operation of the authority of the State, and the power of the State to regulate such connections and the operation of them, ceases to exist; when the Federal government has exercised its power, it covers the whole field; and even if, in certain details, the State act differs from the Federal act, such State act is still inoperative. (*Erie R. R. Co.* v. *New York*, 233 U. S. 671; *Southern Railway Co.* v. *Railroad Commission of Indiana*, 236 id. 439, 448; *Chicago Rock Island, etc., Railway* v. *Hardwick Elevator Co.*, 226 id. 426, 435.) We are unable to find in the statute justification for the claim by the Attorney General that the provisions of the Federal act in question do not apply to canal traffic or State terminals. The terms of the statute are in conflict with this view. Nor do we find in the act any proviso or exception covering the subject matter of this order under review.

Relief can not be had from this conclusion because of the fact that the State of New York is a sovereign State and owns the canal. No power over the canal itself, or its operation, is assumed in this act of Congress; i

assumes to control the interstate commerce between the canal carrier and the rail carrier. The State is not doing the work of a common carrier. The common carriers operating upon the canal are those persons and corporations, owning boats or leasing them, who are engaged in carrying freights thereon, and the required connection and railroad facilities are for the use and benefit of such common carriers. There can be no conflict between the Federal government and a State in the regulation of interstate commerce, the absolute control of which commerce is given by the United States Constitution (Art. 1, sec. 8, subd. 3) to the Federal Government. There would be a curious conflict should it be held that one common carrier (the railroad) was under the control of Congress in this respect and a connecting carrier (the State) was not.

II

IN ORDER TO INVOKE THE JURISDICTION OF THE COMMISSION IT WAS NOT NECESSARY THAT THE STATE OF NEW YORK SHOULD BE A COMMON CARRIER. ITS OWNERSHIP AND MAINTENANCE OF THE TERMINAL QUALIFIED IT AS A PROPER PARTY UNDER THE STATUTE TO FILE THE COMPLAINT

Throughout the record it is emphasized that the State of New York is not a common carrier. The Commission said, "The State is not a common carrier of commerce, intrastate or interstate, but it furnishes the canal and its facilities without charge to common carriers by water." (R. 24.) The two intervenors "are among the canal carriers which do not file tariffs with us or with the State Com-

mission." (R. 25.) The District Court said, "The intervention [3] (so-called) of the two private corporations above-named was almost farcical." (R. 130.)

In concluding the case the District Court said, "Now let it be admitted that the words 'may be' (supra) authorized the commission to step in upon the mere hope or possibility that a connection will make or attract business. But it seems to me quite clear that when the statute declares that when it comes to directing the operation of tracks a determination shall be made of what shall be 'paid to or by either carrier'—such a statute necessarily implies and plainly means that there shall be before the commission, and both subject to its jurisdiction, two carriers. This is an impossibility when one party and the only substantial party before the commission was the State of New York." (R. 133.) (Assigned as Error X, R. 145.)

The history of the times disclose that water competition was stifled by the ownership and management of water lines by the rail carriers. The latter thus indirectly owned and controlled the docks. *United States* v. *Pacific & Arctic Railway,* 228 U. S. 87, 102, 104. The Panama Canal Act was designed to break up that situation by divorcing completely the water and rail lines and compelling physical connection between rail lines and docks of water lines for through movement of traffic.

[3] The Commission held that under the rules and practices before that body the objection to the form of the intervention at the time it was allowed was not well taken. (R. 23.)

The amendments of 1920 broadened the terms of the statute in order more effectively to accomplish that purpose.

The all-embracing provisions of the statute [4] declare that—

(*a*) When property
(*b*) may be or
(*c*) is
(*d*) transported
(*e*) from point to point
(*f*) in the United States
(*g*) by rail and water
(*h*) through the Panama Canal
(*i*) or otherwise,
(*j*) the transportation
(*k*) being by a common carrier or carriers,
(*l*) and not entirely within the limits of a single State,
(*m*) the * * * Commission shall have jurisdiction of such transportation and
(*n*) of the carriers,
(*o*) both by rail and by water,
(*p*) which may or do engage in the same,
(*q*) in the following particulars, * * *:
(*a*) To establish
(*b*) physical connection
(*c*) between the lines of the rail carrier

[4] Appendix A.

(*d*) and the dock at which interchange of passengers or property is to be made

(*e*) by directing the rail carrier to make suitable connection

(*f*) between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way,

(*g*) or by directing either or both the rail and water carrier,

(*h*) individually

(*i*) or in connection with one another,

(*j*) to construct and connect with the lines of the rail carrier

(*k*) a track or tracks to the dock.

The Commission shall have full authority to

(*a*) determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and

(*b*) it may, either in the construction or the operation of such tracks,

(*c*) determine what sum shall be paid to or by either carrier: * * *

To establish

(*a*) through routes and maximum joint rates

(*b*) between and over such rail and water lines,

(*c*) and to determine all the terms and conditions under which such lines shall be operated

(*d*) in the handling of the traffic embraced.

To establish

(*a*) proportional rates,

(*b*) or maximum, or minimum,

(*c*) or maximum and minimum proportional rates,

(*d*) by rail

(*e*) to and from the ports to which the traffic is brought,

(*f*) or from which it is taken

(*g*) by the water carrier, and

(*h*) to determine to what traffic and

(*i*) in connection with what vessels and

(*h*) upon what terms and conditions

(*i*) such rates shall apply.

Do the facts bring the case within the terms of the statute?

1. *When property may be or is transported.*

The evidence shows that a tremendous volume of freight traffic both interstate and intrastate is interchanged by Barge Canal carriers. (R. 24.) The New York Central never claimed there would be no property to transport. Its strenuous resistance to furnishing the transportation service is that too much traffic will move *via* the rail and water routes. The District Court said, "Now let it be admitted that the words 'may be' (*supra*) authorized the Commission to step in upon the

mere hope or possibility that a connection will make or attract business." Naturally if there were no property that *may be* transported the New York Central would have no transportation service to render with respect thereto. Its resistance to the complaint was based on its fear of loss of business.

2. *From point to point in the United States by rail and water through the Panama Canal or otherwise.*

Freight moving from the west and destined to Troy, Albany, New York City, or any other point on the Barge Canal, and moving *via* New York Central to Buffalo and Barge Canal to destination, fulfils this requirement.

3. *The transportation being by a common carrier or carriers and not entirely within the limits of a single State.*

New York Central Railroad and a common carrier on the Barge Canal—any one of the many listed—fulfil this requirement. (R. 24, 124.)

4. *The Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same.*

Meaning thereby that *any* carrier, whether by rail or water whensoever and wheresoever, who participates to any extent, however slight, shall be subject to regulation by the Interstate Commerce Commission. There is no mandate that the Commission may not act unless it may lay its hands on *two or more* carriers. The statute means *any and all*—singly, jointly, or collectively. Obviously there may be one carrier conducting both the rail

and water transportation; or two carriers, one conducting the rail and the other the water transportation; and so on. But there is no mandate that the Commission may not lay its hands on one, or that there shall be brought before the Commission more than one carrier before it may act.

Jurisdiction to do what?

5. *To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made.*

That is not a mandate that there shall be *two* carriers. "Rail carrier" means the New York Central; "the dock" means Erie Basin Terminal. They are as completely identified as if each had been specifically mentioned by name. It is the *dock* at which the interchange is to be made. The statute is singularly silent on *ownership*. If ownership of the dock by a common carrier is a condition precedent, then all of the large municipal docks and piers at the great port cities would fall without this specification of the statute, including the Commonwealth Pier at Boston and the miles of piers and docks constructed and maintained by the City of New Orleans.

How?

6. *By directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way.*

The direction shall be laid on the rail carrier, not on the *owner* of the dock or on any water carrier. Whence did the District Court derive its limitation that *two carriers* were essential? Certainly not from those words. Here again the New York Central and Erie Basin Terminal are as completely identified as if each had been specifically mentioned. The specifications enumerated by the statute identify each of them completely.

7. *Or by directing either or both the rail and water carrier, individually.*

This would directly negative the construction of the District Court that the Commission must at all times have before it at least *two* carriers. The words "either * * * individually" do not include two.

8. *Or in connection with one another.*

The disjunctive "or" is twice used. "Either *or* both" and "individually *or* in connection with one another," are words used to broaden the jurisdiction of the Commission and not to restrict the same.

9. *To construct and connect with the lines of the rail carrier.*

"The rail carrier" means the New York Central.

10. *A track or tracks to the dock.*

The word "dock" in this statute means exactly what it says and does not mean the sovereign State of New York, or a common carrier, or the *owner* of the dock. It means the dock from which traffic "*may be or is transported* * * * by a common carrier or carriers."

The remaining provisions fully authorize the Commission "to prescribe, when necessary, the terms and conditions upon which the connecting tracks shall be operated, or, either in the construction or the operation of those tracks, to determine what sum shall be paid to or by either carrier." (R. 29.) The District Court says these words require that two carriers shall be before the Commission. Counsel for New York Central, as later appears, defeated the State in her own courts by successfully maintaining that she was operating the Terminal as an instrumentality of interstate transportation (Point III, *infra*).

The Court knows judicially that the connection of tracks to docks and the operations of handling cars thereover to shipside is not an uncommon occurrence in transportation. In every large port city such operations are conducted on a vast scale. Norfolk, Gary, Cleveland, and Galveston are conspicuous examples. The Court likewise knows judicially that in frequent, if not all, instances the service of switching and handling of cars to and from the docks is performed by the rail carriers either directly or by their terminal switching agencies and that the rail carriers furnish the cars. The Commission found:

> As the State and the Canal carriers have no railroad motive power or cars, and it would be impracticable and uneconomical for them to purchase and operate the same, the practical effect of this refusal is to pre-

clude any interchange of traffic at the terminal between the rail and canal carriers. (R. 26.)

Concurring, Commissioner Eastman said (R. 35):

> No water line is equipped to operate over these rails, or could so equip itself without disproportionate expense. The New York Central is so equipped and can operate over these rails, which the State has laid, as readily as it now operates over many other similar spur-track connections in Buffalo.

District Judge Cooper, dissenting, said (R. 136):

> Water carriers are not usually equipped to operate railroad tracks. It follows, therefore, that if the connection here is to be operated at all, it must be by the petitioner railroad, which is equipped for such operation.
>
> Even if this be viewed as an order which compelled the rail carrier to extend its tracks, to which view the writer does not subscribe, nevertheless by other sections of the same statute such power resides in the commission. This power is contained in paragraph 21 of section 1 of the act. Such of the cases cited by counsel for the railroad company on the theory that the order of the Commission requires an unlawful extension of its tracks, as were decided since the act in question, are not in point and the physical situation in the cases cited are clearly distinguishable from the situation in the instant case. The prior cases, of course, can have no bearing.

III

ERIE BASIN TERMINAL IS A FACILITY OF INTERSTATE TRANSPORTATION

In their brief filed in this Court in opposition to the petition for a writ of certiorari in No. 773, *Public Service Commission* v. *New York Central,* October Term, 1921, counsel for the New York Central argued that the subject matter of the case was one which belonged peculiarly to the field of interstate commerce and subject to regulation by the Interstate Commerce Commission; thus:

> The State of New York is especially aiming to construct elevators and to carry a large percentage of the grain from the Great Northwest to the Seaboard. It proposes to form a connection with many of the trunk lines of the United States which are carrying interstate commerce, and to exchange traffic with them. It provides docks, warehouses, loading and unloading apparatus, and railroads for transporting property from rail to boat, and vice versa. It also provides facilities for receiving freight from the cities and towns of the State of New York and transporting the same to other cities and towns in the State of New York and to cities and towns in other States, and to steamers plying with foreign countries, and vice versa.

In their brief in No. 773, *supra,* in which they further argued that the Federal Government alone had the power to regulate the subject matter in controversy, the counsel for the New York Central

cited the following language of this court from *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296, 305:

> One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character; that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier, *United States* v. *Sioux City Stock Yards Co.,* 162 Fed. Rep. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts, *Union Stockyards Co. of Omaha* v. *United States,* 169 Fed. Rep. 404; *Belt Railway Co. of Chicago* v. *United States,* 168 Fed. Rep. 542; and under the Twenty-Eight Hour Law, *United States* v. *Sioux City Stock Yards Co., supra.*

They concluded their Brief in No. 773 with the following:

> When the State engages in business as a common carrier it assumes the same obliga-

> tions and liabilities which are incident to that business when it is conducted by individuals. (*Michie on Carriers,* Vol. 1, page 3, Sec. 1.)

District Judge Cooper, dissenting, in the instant case, said (R. 135):

> The rail carrier is inconsistent in contending in this court that there is no interstate commerce, even potential, which would pass through this terminal and that, therefore, the Interstate Commerce Commission had no jurisdiction to make the order in suit after prevailing in the State courts on the ground that there was interstate commerce and that, therefore, the State public service commission had no jurisdiction.

"The nature of the use to which it is devoted when built," and not the ownership or circumstances surrounding its construction, is the test of the extent to which a track becomes a transportation facility and subject to regulation as such.

In *Union Lime Co.* v. *Chicago & Northwestern,* 233 U. S. 211, 221, 222, this Court, speaking through Mr. Justice Hughes, said:

> It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track and the nature of the use to which it is devoted when built.

A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in *Hairston* v. *Danville & Western Rwy. Co., supra* (p. 608): "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp* v. *Hibernia R. R. Co.*, 47 N. J. Law, 43; *Chicago &c. R. R. Co.* v. *Porter*, 43 Minnesota, 527; *Ulmer* v. *Lime Rock R. R. Co.*, 98 Maine, 579; *Railway Company* v. *Petty*, 57 Arkansas, 359; *Dietrich* v. *Murdock*, 42 Missouri, 279; *Bedford Quarries Co.* v. *Chicago &c. R. R. Co.*, 175 Indiana, 303.

While common carriers may not be compelled to make unreasonable outlays (*Missouri Pacific Rwy. Co.* v. *Nebraska*, 217 U. S.

196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow. The Supreme Court of Wisconsin has left no doubt with respect to the public obligations imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the State power.

IV

THE OPINION OF THE DISTRICT COURT NOT ONLY ERRONEOUSLY MADE OVER AND CONSTRICTED THE FINDINGS OF THE COMMISSION, BUT ITS ADDED FAILURE TO RECOGNIZE THE STATE OF NEW YORK AS A PARTY WITH ANY RIGHT OR STANDING BEFORE EITHER THE COMMISSION OR THE COURT WAS LIKEWISE ERRONEOUS

Section 500 of the Transportation Act (Ap. A, p. 49) provides:

> It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

The following expressions will indicate the approach to the case made by the District Court (italics ours):

> Upon its property the State has constructed what *from the meager evidence is a sort of freight yard.* (R. 127.)
>
> The intervenors filed no further pleading; an official or agent of each testified before the Commission, *apparently at the instance of the State of New York. This was the extent of their intervention.* (R. 129.)
>
> *The intervention (so called) of the two private corporations above named was almost farcical.* Both of them averred (in their application for intervention) that they were common carriers of goods, &c., upon the barge canal. But no evidence was given that either of these concerns was or ever had been engaged in interstate commerce. (R. 130.)
>
> It is always advisable, and sometimes vital, to get behind the forms and formal parties of a litigation and ascertain who is the actual person insisting on the demand in suit, what that person wants, and why it is wanted. (R. 130.)
>
> In form this suit has nothing to do with the State of New York, but the truth is that the State is by long odds the person or party most seriously involved and it is the maker of the essential demand herein. (R. 130.)
>
> Description of that demand may be approached by another quotation from the dis-

senting opinion of Kellogg, J., in 198 A. D. 436. * * *

* * * The State did build the terminal, it owns it, and has made of the Erie Basin terminal *what may fairly be called a railroad yard*. But in the sense of operating or rendering useful the railroad yard that is the important part of that terminal, it never has done and does not intend to do the same. *This case results from an effort to make someone else do what it has declined to do.* (R. 130.)

If the State should enter upon common carriage, and for that purpose acquire rolling stock, etc., it might well *pro tanto* lay aside its sovereignty and subject itself to the jurisdiction of mere regulatory authority whether of its own creation, of another State, or of the Nation. (R. 130.)

But New York has done nothing of this kind. It did petition the Interstate Commerce Commission to grant the order now attacked, *but it distinctly did not prefer that petition as a common carrier,* much less as one subject to the regulatory jurisdiction of the Commission itself. (R. 130.)

Therefore one way, and an accurate way, of putting the question before us is to inquire whether at the request of a sovereign State which is not a common carrier *but is beyond and superior to the regulatory or coercive power* of the Commission,—that body can lawfully compel a carrier undoubtedly

subject to its jurisdiction to operate the State's property, i. e., *to take over the management of the State's Erie terminal which the State itself refuses to operate as a railroad yard.* (R. 130.)

It is here essential to state that *I regard the order complained of as having been made solely on the demand and at the suit of the State of New York.* (R. 130.)

* * * *that State having taken the trouble* to make a freight yard along side the barge canal and contiguous to the tracks of the New York Central Railroad *desired that railroad to take over and operate that freight yard in order to attract business to its canal.* (R. 131.)

It is a fair summary of what this order means that the plaintiff railroad shall extend its Buffalo yards so as to make the State's terminal an integral portion thereof. *Practically the railroad is commanded to enter upon the State's property and establish a freight depot with appropriate switching and distributing service at the canal edge.* (R. 131.)

The entire cost of this operation is laid upon the plaintiff railroad; also (so far as shown by this record) the entire cost of upkeep of terminals, tracks, etc. The charges to be made for these services seem to be at present left to be fixed by the plaintiff railroad, subject, however, to the regulatory power of the Commission. (R. 131.)

The courts of New York have decided that the Public Service Commission of that

State can not do what the State wants, and the Supreme Court has not affirmed that ruling, but declined to disturb it; consequently we accept it. But no court has said as yet that in a proceeding such as was actually brought by the State before the Interstate Commerce Commission that body was empowered to give the State what it wanted. (R. 131.)

Could the Commission lawfully require the Railroad to extend its lines by undertaking the management and operation of another's railroad property,—especially when that other is a sovereign State and not judicially compellable to respond for its own wrongs or to maintain in operative condition the property to be managed by the railroad. (R. 132.)

So I cull from the statute words which seem to me fairly to express the idea which the majority of the Commission thought authorized the order now complained of. (R. 132.)

Now, let it be admitted that the words "may be" (*supra*) authorized the Commission *to step in upon the mere hope or possibility that a connection will make or attract business.* But it seems to me quite clear that when the statute declares that when it comes to directing the operation of tracks a determination shall be made of what shall be "paid to or by either carrier"—such a statute necessarily implies and plainly means that there shall be before the Commission, and both subject to its jurisdiction, two carriers. This is an impossibility when

one party and the only substantial party before the Commission was the State of New York. (R. 133.)

District Judge Cooper, dissenting, gauged the case in such a way as fully to meet the intention of the Congress in enacting the statute (R. 135):

> Even if none of the boats of the intervening water carriers themselves move interstate or transport freight which moves in interstate transit, nevertheless the rail carrier is an interstate carrier, and the statute would be satisfied by the carrying of freight which crosses the State line on the defendant railroad's cars and passes through this terminal for water transportation for points in the State of New York having water connections. It would also be satisfied with shipments originating in New York State carried by water carrier to the terminal in question and then transported over the railroad lines to other States.
>
> One of the plain purposes of the Federal statute is the supplying of facilities for the exchange of interstate water and rail traffic where no such facilities now exist, or in other words for the promotion of interstate commerce by compelling interchange between rail and water carriers, one or both being engaged in interstate commerce.
>
> Of course, there can be no interstate or other commerce by rail and water carrier through this terminal if no one operates the connecting tracks on the terminals. It is clear, however, that there is potential inter-

state commerce at this point. The statute does not require the present existence of such interstate commerce by rail and water carrier or carriers. The statute is satisfied if there " may be " such commerce. There being potential rail and water interstate commerce through this terminal and a physical connection between the lines of the rail carrier and the tracks on the terminal dock to which the water carrier has access, it was within the power of the Interstate Commerce Commission to require the connection and the tracks on the terminal to be operated by the rail carrier.

The very ground of the decision in the State courts was that the potential traffic through this terminal was interstate, in part at least, and, therefore, the Interstate Commerce Commission and not the public-service commission of the State had jurisdiction. (*Peo. ex rel. N. Y. Central* v. *P. S. Com.* 198 App. Div., 436, 442, affirmed 232 N. Y. 606 without opinion.)

V

THE ORDER OF THE COMMISSION IS NOT INVALID BECAUSE IT EMBRACES "ALL TRAFFIC, INTERSTATE AND INTRASTATE," THAT MAY BE TRANSPORTED TO OR FROM THE TERMINAL OVER THE NEW YORK CENTRAL LINES. (R. 7.)

Paragraph XXIV of the petition (R. 12) charges that the order is null and void in that it expressly purports to require the New York Central to perform the operating service and furnish

transportation with respect to intrastate traffic although the statute refers only to transportation "not within the limits of a single State."

If the Commission had jurisdiction at all it had jurisdiction to enter the order in the form in which it was drawn. To have excluded intrastate commerce therefrom would have been a clear discrimination against the latter. This Court has repeatedly held that when in the exercise of the regulatory power conflicts arise between Federal and State authorities out of which preferences and discriminations result the Federal law is supreme over all. (*Minnesota Rate Cases*, 230 U. S. 352; *The Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *United States* v. *Village of Hubbard*, 266 U. S. 474; *United States* v. *State of Tennessee*, 262 U. S. 318; *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456.)

Here again the State, having invoked the jurisdiction of the Commission, may not well complain of the order which the Commission made in its favor. Whether, as between the State of New York and the New York Central Railroad, the State may yet regulate the purely intrastate commerce which may move over the canal and the facilities in connection therewith is a question which does not arise on this record.

VI

CONCLUSION

The decree should be reversed and the cause remanded with directions to dissolve the permanent injunction and to dismiss the petition for want of equity.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

OCTOBER, 1926.

APPENDIX A

THE STATUTE

Section 6 of the Interstate Commerce Act, as amended by Section 11 of the Act of August 24, 1912, commonly known as "The Panama Canal Act" (ch. 390, 37 Stat. 566, 568), and by Sections 412 and 413 of the Transportation Act of 1920 (ch. 91, 41 Stat. 483), now provides:

> That section six of said Act to regulate commerce, as heretofore amended, is hereby amended by adding a new paragraph at the end thereof, as follows:
>
> (13) "When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:
>
> "(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of

the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act."[1]

---

[1] The original paragraphs (a) and (c) as contained in Section 11 of the Act of August 24, 1912, for which the language of the Transportation Act of 1920 was substituted, are as follows:

(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

"(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

"(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such

---

this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

* * * * *

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

Section 500 of the Transportation Act of 1920 (ch. 91, 41 Stat. 499), under "Title V. Miscellaneous Provisions," also provides:

SEC. 500. It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and developing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suit-

able for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish, and distribute, from time to time, such useful statistics, data, and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

APPENDIX B

The following excerpts from the Interstate Commerce Act in which water lines or transportation by water lines and the facilities relating thereto are printed for ready reference.

That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, *or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;* or

(b) The transportation of oil or other commodity, *except water* and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water. (41 Stat. 474.)

To the transportation of passengers or property by a carrier *by water* where such transportation would not be subject to the provisions of this Act except for the fact that such carrier absorbs, out of its *port-to-port water rates* or out of its proportional through rates, any switching, terminal, *lighterage,* car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, *lighterage, or corporate limits of a port terminal or district.* (41 Stat. 474.)

The term " railroad," as used in this Act, shall include all bridges, car floats, *lighters,* and *ferries* used by or operated in connection

with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of persons or property * * *. The term "transportation," as used in this Act, shall include locomotives, cars, and other vehicles, *vessels*, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *. (41 Stat. 474, 475.)

That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, *water,* or otherwise. (40 Stat. 272.)

And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad *or water* or otherwise to obey strictly and conform promptly to such orders. (40 Stat. 273.)

Provided, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the

operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely *potential water competition* not actually in existence. (41 Stat. 480.)

Whenever a carrier by railroad shall in competition with a *water route or routes* reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the *elimination of water competition.* (41 Stat. 480.)

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly through any holding company, or by stockholders or directors in common, or

in any other manner) *in any common carrier by water operated through the Panama Canal or elsewhere* with which said railroad or other carrier aforesaid does or may compete for traffic or any *vessel* carrying freight or passengers upon said *water route* or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense. (37 Stat. 566, 567.)

Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance *of any vessel or vessels already in operation,* or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. (37 Stat. 567.)

If the Interstate Commerce Commission shall be of the opinion that any such existing specified *service by water other than through the Panama Canal* is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the *route by water* under consideration, the Interstate Commerce Commission may, by order, extend the time during which such *service by water* may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such *water carrier* shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same

manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation. (37 Stat. 567.)

That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, *or by water* when a through route and joint rate have been established. (34 Stat. 586.)

* * * The Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, * * * to be charged (or, in the case of a through route where one of the carriers *is a water line,* the maximum rates, fares, and charges applicable thereto) * * *. (41 Stat. 485.)

The Commission may, * * * establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a *water line,* the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a *water line.*

* * * nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly *by water*, and any transportation by *water* affected by this Act shall be subject to the laws and regulations applicable to *transportation by water*. (41 Stat. 485.)

In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is *a water line*), require any carrier by railroad, without its consent, to embrace such route. * * * (41 Stat. 485.)

When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly *by water* within the continental United States, subject to this Act. * * * (41 Stat. 488.)

Provided, That if the loss, damage, or injury occurs while the property is in the custody of *a carrier by water* the liability of such *carrier* shall be determined by and under the laws and regulations applicable to *transportation by water*, and the liability of the initial carrier shall be the same as that of *such carrier by water*. (41 Stat. 494.)

Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first to baggage carried *on passenger trains or boats, or trains*

or boats carrying passengers. * * * (39 Stat. 442.)

That the common carrier, railroad, *or transportation company* issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof. (34 Stat. 595.)

That every common *carrier by water in foreign commerce,* whose vessels are registered under the laws of the United States shall file with the Commission, within thirty days after this section becomes effective and regularly thereafter as changes are made, a schedule or schedules showing for each of its *steam vessels* intended to load general cargo. * * * (41 Stat. 497.)

Upon application of any shipper a carrier by railroad shall make request for, *and the carrier by water* shall upon receipt of such request name, a specific rate applying for such *sailing,* and upon such commodity as shall be embraced in the inquiry, and shall name in connection with such rate, *port charges,* if any, which accrue in addition to the *vessel's rates* and are not otherwise published by the railway, as in addition to or absorbed in the railway rate. *Vessel rates,* if conditioned upon quantity of shipment, must be so stated and separate rates may be provided for carload and less than carload shipments. The *carrier by water,* upon advices from a carrier by railroad, stating that the

quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation from unsold space in such *steam vessel* as shall be required for its transportation and shall so advise the carrier by railroad, in which advices shall be included the latest available information as to prospective sailing date of such *vessel*. (41 Stat. 497.)

When any consignor delivers a shipment of property to any of the places so specified by the Commission to be delivered by a railway carrier to one of the *vessels* upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the *transportation by water* from and for a *port* named in the aforesaid schedule, the railway carrier shall issue through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, *water transportation, and port charges,* if any, not included in the rail *or water transportation charge;* but the carrier by railroad shall not be liable to the consignor, consignee, or other person interested in the shipment after its delivery to the *vessel*. The Commission shall, in such manner as will preserve for the *carrier by water,* the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the *vessel* as a part of its undertaking as a common carrier. (41 Stat. 498.)

○